Filed 11/17/09 In re Martinez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ANTHONY MARTINEZ, on Habeas Corpus.	E046770 (Super.Ct.Nos. CR17502 & RIC507602) OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Petition granted.

Daniel J. Broderick, Federal Defender, and Ann C. McClintock, Assistant Federal Defender, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman and Kathleen R. Frey, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Petitioner Anthony Martinez seeks a writ of habeas corpus to reverse an order of the Governor reversing the Board of Prison Term's (the Board) decision finding him

suitable for parole. Because we find that, applying the standards of recent decisions, there is no evidence to support the Governor's reversal, we grant the petition.

STATEMENT OF FACTS

Petitioner was convicted of first degree murder in 1980, receiving a term of 25 years to life. The facts of the killing are not in any particular dispute and were discussed by petitioner at the parole hearing held on August 1, 2007. Petitioner's family and the family of the victim, Johnny Ahumeda, were on opposite sides of a feud that apparently rivaled, in its intransigence and casual violence, that between the Montagues and the Capulets. The two families had lived in the same neighborhood called "Casa Blanca" for years but, according to petitioner, the Ahumedas and their associates, the Romeros, "they had an attitude that if you weren't with us, you were against us." Apparently, the Ahumeda group were upset by the marriage of petitioner's brother into a third family, "[a]nd then things just started happening where they tried to set up my brother. And by that time my brother had got incarcerated and I was out there by myself. And then, you know, things just started going on more and more. They came looking for me at my house one night. . . . So I go outside and we have a shootout. . . . I only got shot in the foot. And then after that . . . Johnny and his cousin, they had jumped me. . . . And Johnny's last statement was that next time he gets me, he catches me, he was going to kill me. And I believe the only reason why he didn't do it that night was because there was some witnesses that popped up in the scene . . . . So I made it in my mind that, you know, they are not going to kill me. Before they kill me, I'm going to kill him. And that's what I did." It should be noted that at the time he was assaulted by the victim,

petitioner's lower leg was in a cast resulting from the earlier shooting, no doubt contributing to his sense of vulnerability.

On the evening of the murder, petitioner and Ahumeda had been together talking and drinking, and they had "more words about the [jumping] incident that happened." Although petitioner yielded to his girlfriend's insistence that he leave, after driving off he circled back, approached the victim, and shot him several times.[1] Petitioner candidly admitted that the weapon was illegal, that he carried it on a regular basis, and that he had previously fired it "[s]hooting at them, them shooting at me."

Petitioner was 18 years old at the time of the killing and had one arrest as a juvenile, for possession of a firearm, for which he had been placed on probation. He had been drinking alcohol since the age of 14, "that was just the way you live in the neighborhood. You just drink and drink."

As the presiding commissioner observed in an understatement, petitioner was a "busy guy" during the first several years of his incarceration, amassing 12 serious "Rules Violation Reports" or "115s." Several of these involved violence or weapons, including his participation in at least two stabbing attacks and one altercation involving a member of the Ahumeda family. However, the last of these was in 1988, and petitioner has not received a counseling "chrono" or "128" since 1982.

---

[1] The Governor's reversal letter indicates that a companion of Ahumeda, named Ayala, was injured in the shooting. The record is not clear as to whether this was intentional or whether Ayala was hit by a bullet intended for Ahumeda.

Petitioner obtained his GED in 1983 and has completed several vocational programs (drafting, finish carpentry, mill and cabinet, silk-screening). In the year since his previous hearing alone,[2] he collected over 10 "laudatory chronos" or favorable work reports. Among these were "chronos" relating to his regular participation in the "Convicts Reaching Out to People" (CROP) program ("positive influence in his interaction with at-risk youth"); carpentry ("continues to be an asset," "[performs a]ll of his duties . . . in a safe and professional manner . . . and is always helpful to custody and ancillary staff," "has never been anything but pleasant and respectful to all staff and fellow inmates" "possesses a positive attitude," and has "imaginative, cognitive, and problem-solving abilities as well as . . . exemplary carpentry skill[s]"); and painting ("with his attitude and work skills, given the chance, I believe Martinez would be a productive citizen"). A correctional officer who had been familiar with Martinez for several years wrote, "he has always shown respect and courtesy . . . . He will be an asset to society."[3]

---

[2] Petitioner has twice been found suitable for parole *before* the current proceedings, in 2003 and 2006. Both times the Governor reversed the finding of suitability.

[3] This pattern of achievement and praise was not new. In the most recent psychological report of August 2005, to which we will return later, the evaluator noted "chronos" the writers of which included comments such as "positive attitude" (several usages), "has shown leadership and good communication skills," "[to be] commended for his demeanor, character and behavior which, in the writer's opinion, has been an influential visual example to the other inmates."

At the time it found petitioner suitable for parole in 2003, the Board noted his recent participation and/or achievements in the CROP program, college Bible studies,

[footnote continued on next page]

Petitioner had previously planned to reside with his mother in the "Casa Blanca" area but when concerns had been raised about the effects of his return on violence-prone neighbors, he made new plans to reside with a brother and sister-in-law a 20- or 25-minute drive away.

Petitioner has been offered a job in landscape maintenance by a friend of a sister although he hoped that this would be only temporary and that he could move into finish carpentry. He had received numerous letters of support from family members and friends. He is in regular contact with his two adult children and has three grandchildren.[4]

When the Governor reversed the suitability finding in 2003, he relied on concerns that petitioner would return to alcohol and/or drugs and criticized what he viewed as petitioner's failure to participate regularly in Alcoholic Anonymous (AA)/Narcotics Anonymous (NA) programs. The Governor also expressed concern that petitioner had not accepted responsibility for the killing. In the 2005 psychological report, the evaluator expressly addressed these issues. First, he noted that petitioner had in fact "had an epiphany and was determined . . . to change his life" in 1990 and began AA attendance in 1990, rather than 1999 as the Governor had believed. (Apparently, the program was

---

[footnote continued from previous page]
[footnote continued from previous page]
"Creative Conflict Resolution," "Problem Solving Group," and a 40-hour "Peacemakers" curriculum.

[4] His son had a child with a member of the Ahumeda family, and petitioner has exchanged cordial letters with the mother. Petitioner's wife was apparently shot by a member of the Ahumeda family several years ago. Petitioner's son has been involved with the ongoing violence.

discontinued sometime after 1992; however, he resumed regular attendance in 1998 or 1999 when he was transferred to his current facility.)

The evaluator also noted that although the Governor had apparently relied on a 1997 "life prisoner evaluation" done by a corrections officer for his finding that petitioner had not promptly taken responsibility for the crime,[5] the records clearly indicated that petitioner had fully admitted his role to a mental health evaluator in 1989 and also at his first parole hearing, apparently either held in that year or the next. This evaluator's overall conclusion was that petitioner "is not a danger to the community." In an evaluation performed several months earlier, another qualified evaluator found that petitioner "poses a very low degree of danger to the public at this time if released from prison."

The district attorney, reversing its previous position of not opposing parole, agreed that "Mr. Martinez's behavior in custody is exemplary . . . there's no problem with that at all." However, he opposed parole on the basis that "Casa Blanca" remained a very violent neighborhood, so that although he disclaimed any fear that petitioner would seek violent revenge, his return might be a "spark for violence" on the part of others. "[T]he feelings and the passions that are—that began all those years ago are still there. . . . Mr. Martinez's release, and his plans to go to Riverside County, I believe do pose an

[5] At the time the probation report was prepared, petitioner was still protesting his innocence.

unreasonable risk to the citizens, to Mr. Martinez himself, and to people that might get caught up in the crossfire."[6]

Rejecting these concerns, the Board found petitioner suitable for parole. Among its relevant findings, or comments, were that the killing was the product of an "extraordinary family feud" of which petitioner was also a product, his extensive programming and positive work reports, his 19 years without discipline, the favorable psychological reports, his maturity and "advancing age," and his close family ties. One panel member even informed petitioner that he was an "inspiration."

In reversing the panel's decision on suitability, the Governor, after summarizing the offense, Martinez's youthful history, and his performance in prison, concluded that he posed an unreasonable risk due to three factors: multiple victims, trivial motive, and petitioner's "unacceptable" record of prison discipline.

DISCUSSION

As is true for most decisions involving the confinement of inmates, a decision granting or refusing parole must be upheld if it is supported by "some evidence" of unsuitability. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 626 (*Rosenkrantz*); see also *Superintendent v. Hill* (1985) 472 U.S. 445, 455-456.) The same standard applies whether the decision is made by the Board under Penal Code section 3041 or by the

---

[6] When the issue had been addressed earlier, petitioner told the panel that he had made plans under the belief that he was *required* to parole to Riverside County. One of the commissioners noted that this is not in fact true (Pen. Code, § 3003, subds. (a), (b)) and expressed surprise that the possibility of parole to another county had not been raised at petitioner's previous hearing(s).

Governor in reviewing the Board's decision under section 3041.2, although the Governor does have the authority to conduct an independent, de novo review of the inmate's suitability. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204 (*Lawrence*).)

Consideration of public safety is the primary statutory issue to be determined in deciding whether an inmate should be granted parole. (§ 3041, subd. (b).) However, the Legislature has established guidelines to be followed in making the decision.[7]

Furthermore, when the Board conducts its *initial* review one year before a life inmate's minimum eligible parole release date, the panel "shall *normally* set a parole release date." (§ 3041, subd. (a), italics added.) Thus, it is clear that for parole to be denied, some evidence must exist overcoming the statutory presumption that an inmate who has served his minimum term is ready for parole.

Our review of the Governor's decision is deferential, but as aptly stated by the court in *In re Scott* (2004) 119 Cal.App.4th 871, 898 (*Scott*), this standard "does not convert a court reviewing the denial of parole into a potted plant." Indeed, although prior to the decision in *Lawrence* and its companion case *In re Shaputis* (2008) 44 Cal.4th

---

[7] The guidelines are set out in the California Code of Regulations. (Cal. Code Regs., tit. 15, § 2402.) One set of unsuitability factors relate to the commitment offense and whether it was "especially heinous, atrocious or cruel"—that is, whether it involved multiple victims, was committed in a dispassionate and calculated manner, demonstrated an "exceptionally" callous disregard for human suffering, involved abuse, defilement, or mutilation of the victim, or was the product of a trivial motive. Other unsuitability factors relate to the inmate—a previous history of violence, unstable social history, sexual sadism, mental problems, and institutional misconduct. On the suitability side, the panel is to consider the lack of juvenile history, a stable social history, remorse, the presence of unusual stress as a motive, lack of prior criminality, current age, future plans, and institutional behavior.

1241 (*Shaputis*), published decisions granting parole were rare, now that the Supreme Court has clarified the required analysis trial and appellate courts have been overturning denials far more commonly.[8]

The crux of the decisions in *Lawrence* and *Shaputis* is that it is not enough that "some evidence" support a factual finding with respect to one or more of the guideline criteria. Rather, as the Supreme Court explained, the focus is on whether the criteria found to exist bear on the inmate's "current dangerousness." (*Lawrence, supra,* 44 Cal.4th at pp. 1210-1211.) Thus, in *Lawrence,* the excessive and egregious nature of the inmate's commitment offense did *not* provide sufficient reason to deny her parole when balanced against over 20 years of incarceration spent discipline-free and filled with educational, vocational, and "personal-growth" accomplishments. The court also explained that once an inmate has served the "suggested base term" for the killing (as petitioner has), "the underlying circumstances of the commitment offense alone *rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness*." (*Lawrence,* at p. 1211, italics added.)

---

[8] E.g., *In re Dannenberg* (2009) 173 Cal.App.4th 237 (*Dannenberg*); *In re Palermo* (2009) 171 Cal.App.4th 1096; *In re Rico* (2009) 171 Cal.App.4th 659; *In re Vasquez* (2009) 170 Cal.App.4th 370; *In re Gaul* (2009) 170 Cal.App.4th 20; *In re Burdan* (2008) 169 Cal.App.4th 18 (*Burdan*); *In re Singler* (2008) 169 Cal.App.4th 1227 (*Singler*). We do note that several other Court of Appeal decisions granting parole were subsequently depublished by the Supreme Court and, of course, not every published decision orders parole. (See, e.g., *In re Rozzo* (2009) 172 Cal.App.4th 40.) A search through the LEXIS search engine also reveals literally dozens of post-*Lawrence* unpublished appellate rulings either granting parole or, at the least, remanding for new proceedings in light of the Supreme Court's decision.

Viewed in this light, the Governor's decision is clearly flawed. First, it is doubtful whether the original offense was even "worse than usual" with respect to other first degree murders. Although two victims were involved, as we noted above, the shooting of Ayala may have been inadvertent. Although the killing was certainly "calculated," this is true of virtually all first degree murders not based on the felony-murder doctrine. "The measure of atrociousness is not general notions of common decency or social norms, for by that yardstick all murders are atrocious." (*In re Lee* (2006) 143 Cal.App.4th 1400, 1410; see also *Scott, supra*, 119 Cal.App.4th at p. 891 [noting that "[*a*]*ll* second degree murders by definition involve callousness—i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and sufferings of others," italics added].) Viewed in the appropriate context of all first degree murders, petitioner's offense was not particularly cruel or callous. (Cf. *In re Bettencourt* (2007) 156 Cal.App.4th 780, 800 [inmate and crime partner beat and stabbed the victim to death in a prolonged attack, then dumped the body over a cliff]; *In re Lowe* (2005) 130 Cal.App.4th 1405, 1427-1428 [inmate shot ex-lover five times in the head and chest while the latter slept, then left the body on the bed for two months before placing it in a coffin, which he used as a nightstand].)

The Governor also concluded that petitioner's motive for the killing was "trivial," but we respectfully disagree. Shooting a convenience store clerk who fumbles while opening the cash drawer is done for a "trivial" motive; shooting an enemy who has committed acts of violence against you and made a credible threat to kill you is at least understandable and the motive is *not* trivial.

More importantly, as was true in *Lawrence*, it cannot be said that the nature of petitioner's crime has any substantial predictive value over 25 years later. The shooting of Johnny Ahumeda had a specific origin in the neighborhood feud and culture of violence in which Martinez grew up; furthermore, as noted above, it was prompted by a specific threat of personal harm to petitioner. But even if the neighborhood (to which petitioner does not intend to return) has stayed the same, it is clear that petitioner has not. There is *no* evidence that he is presently impulsive, vengeful, or violent, and overwhelming evidence that he is not.

In this respect, the Governor's reliance on petitioner's concededly abysmal behavior over the first several years of his sentence is similarly inappropriate. In our view, as time passes the immutable nature of specific acts of in-prison misconduct are subject to the same analysis as the "nature of the crime." Certainly it is impressive when an inmate "sees the light" immediately upon his incarceration after the life crime. (E.g., *Lawrence*, *supra,* 44 Cal.4th 1181; *Singler, supra*, 169 Cal.App.4th 1227; *Scott, supra,* 119 Cal.App.4th 871.) An unblemished history of institutional good behavior also tends to suggest that the commitment offense was an aberration. However, the most significant factor in an inmate's disciplinary history is not whether he has *ever* violated prison rules, but whether he has conformed his behavior for a sufficiently long period to establish that conformity and good conduct is now the inmate's "norm" or typical, predictable behavior.

Obviously each case is different but, in our view, 20 years is long enough to inspire confidence, and petitioner's turbulence during the 1980's can no longer be used to

predict future violence or other criminal conduct. It is notable that petitioner's disciplinary history did not "peter out"; his violent conduct stopped abruptly after 1987, when he received a "115" for possession of a weapon, and his 1988 "115" was for the less serious unauthorized possession of a radio. Whether or not petitioner had an "epiphany," as described by the mental health evaluator, he clearly took steps to change his life (including beginning with AA). He is no longer an angry, substance abusing youth; he is now a middle-aged man who has not committed an antisocial or prohibited act in 20 years. He has good job skills, a supportive family, and the evidently universal respect of those who come in contact with him. Two mental health evaluators agree that he would represent a minimal risk to the public if released from prison. At this point, his life crime and his early misconduct while incarcerated have no predictive value concerning his future conduct.

Accordingly, we grant the petition. As the Governor's finding of unsuitability has no evidentiary support, it cannot stand.

Respondent asks that we remand to the Governor for his further consideration. This would be appropriate, for example, if the Governor had relied on some valid factors and some invalid factors or inaccurate suppositions. In such a case, we could not predict what the Governor's decision would be if he considered only the appropriate factors. (See *In re Capistran* (2003) 107 Cal.App.4th 1299, 1306-1307.) However, in this case, remand would be an idle act because the Governor has explained that his decision was based upon factors and information that, as we have held, simply do not support the

ultimate finding of dangerousness.[9] Respondent's "separation of powers" argument, founded on language in *Rosenkrantz*, *supra*, 29 Cal.4th at page 662, is unpersuasive given the fact that in *Lawrence*, the Supreme Court itself affirmed the judgment of the Court of Appeal vacating the Governor's denial and reinstating the decision of the Board. (See also *Dannenberg*, *supra*, 173 Cal.App.4th 237, and *Burdan*, *supra*, 169 Cal.App.4th 18.) Where the undisputed facts lead only to one conclusion, we are not interfering with the executive power by denying it the opportunity to do something it cannot lawfully do.

DISPOSITION

The petition for writ of habeas corpus is granted. The Governor's order reversing the decision of the Board is vacated and the decision of the Board is reinstated.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

GAUT
Acting P.J.

We concur:

HOLLENHORST
J.

McKINSTER
J.

[9] We are also compelled to note that the Governor previously relied on factors that were factually inaccurate in his 2004 decision, although there was apparently no legal challenge at that time (at least in the state courts). Hence he has had two opportunities to proffer a valid reason for denying petitioner parole and has failed to do so.